UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

GILDAN ACTIVEWEAR MIAMI, INC.[1]

Employer

and **Case 12-RC-8439**

FREIGHT DRIVERS WAREHOUSEMEN & HELPERS LOCAL 390, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act

[1] The name of the Employer appears as amended at the hearing.
[2] The briefs filed by the parties have been carefully considered.

and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees employed by the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer and the Petitioner stipulated regarding an appropriate unit herein: all full-time and regular part-time warehouse distribution employees, including carton inspectors, loaders/unloaders, order checkers, order pickers, pallet jack operators, quality control workers, reach truck operators, scanners, system inventory workers, team leaders, yard jockeys, traffic clerks, shipping clerks and inventory clerks, excluding all other employees, guards and supervisors as defined in the Act.

The Employer contends that the agency-referred individuals who work at its distribution center should be included in the unit; the Employer refers to these individuals as its "probationary employees". The Employer refers to its "permanent employees" as the agency-referred individuals who have passed the 11 to 13 week "probationary period" during which they were paid by the agency, and who are thereafter paid by the Employer with higher wages and benefits. The Union asserts that the Employer's "permanent employees" only should be included in the unit.[4]

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[3] The parties stipulated that Gildan Activewear Miami, Inc., herein called the Employer, is a Florida corporation with an office and place of business located at 3400 B Northwest 74th Avenue, Miami, Florida, known as its distribution center, where it is engaged in the business of manufacturing and marketing activewear apparel. During the past l2 months, a representative period, the Employer, in the course and conduct of its business operations, purchased and received at its Miami, Florida, location goods and materials valued in excess of $50,000 directly from points located outside the State of Florida.

[4] In its brief, the Petitioner offered various alternative eligibility formulas, based on the Employer's predictions of the number of agency-referred individuals who will be hired as "permanent employees" in 2000. Based on the undersigned's findings below, it is unnecessary to address them.

The Employer contends that an election should be delayed until early April 2000 due to the "extreme seasonal nature" of its operations. The Union asserts that the Employer is not engaged in a seasonal industry as it is a year-round operation with a peak period of production; and the Employer does not rehire or recall employees from its prior peak period. The Union contends that the election should be held as soon as possible.

The record evidence consists of the testimony of David Cherry, President of Gildan Activewear SRL, the international division. The Employer also proffered a summary of "payroll" records for January through November 1999, and copies of original "payroll" records for one week in each of the aforesaid months except January and March 1999.[5] As of the date of the hearing herein, December 17, 1999, the Employer employed approximately 70 "permanent employees", with an additional six or seven agency-referred individuals.

The record evidence shows that the Employer produces T-shirts, golf shirts, and sweatshirts in its sewing/assembly operations in Central America. T-shirts account for 90 percent of its sales; golf shirts and sweatshirts each account for five percent of its sales. Its customer service operations in Barbados process all orders for its products. The orders are transmitted to the Miami distribution center, and the shipping clerks prepare the picking/shipping orders. The products are shipped by truckload to customers in the United States, and the products are screen printed or design stitched for sale in the retail market.

[5] The "payroll" records consist of timekeeping reports on the agency-referred individuals which are prepared by the Employer and submitted to the agencies so the aforesaid individuals can be paid by them, and the Employer's "ADP" payroll records of its "permanent employees".

The Miami distribution center began operations in October 1998. Its managerial hierarchy consists of the distribution center manager, logistics manager, two shipping shift managers, and two receiving shift managers.[6] In addition, there are several "hourly supervisors."[7] The warehouse operates seven days a week. One shift works Monday through Wednesday, and the other shift works Thursday through Saturday; they alternate working on Sunday. Each shift works from 6:00 a.m. to 6:00 p.m. From January through September, there is a night shift with an average of 30 to 40 workers.

Two personnel agencies refer individuals to work at the Employer's Miami distribution center: On Site Commercial Staffing and Personally Yours.[8] According to Cherry, the Employer does not have a written contract with either agency. The Employer proffered a summary of the services provided by Personally Yours: "11 week temp to hire placement period," "no liquidation fee after the initial 11 week period," "drug and local background check for all temp to hire associates," "exclusive account service supervisor," "on-site orientation," "same day response," "pay check delivery," and "customized billings."

The Employer notifies the personnel agencies of how many employees it needs for its operations at any given time. The agencies supply all of its non-salaried workforce; two-thirds are general laborers. The agency selects individuals from its database and interviews them. The agency does a background check and drug testing

[6] The parties agreed that these "salaried" managerial employees should be excluded from the unit.

[7] The parties agreed that these "hourly supervisors" should be excluded from the unit. The parties also agreed to exclude the traffic coordinator and the accounts payable clerk from the unit.

[8] Another personnel agency, Ambiance, referred only eight individuals to the Employer in 1999.

of the individual. The agency sends the individual to the distribution center where he is interviewed by the distribution center manager, or in his absence, the shift manager. If the individual "passes" that interview, he is "put to work." The Employer has the right to reject any agency-referred individual.

The Employer has established the hourly wage of $6.50 for all agency-referred individuals. The agency-referred individuals receive no other benefits. The Employer prepares timekeeping reports for submission to the agency. There is no dispute that the agency-referred individuals are on the agency's payroll for a minimum of 11 to 13 weeks. Cherry testified that the Employer pays the agency a fee of 35 to 40 percent of the individual's wages on top of the actual paid wages. If the Employer wants to hire the agency-referred individual as a "permanent employee" before the completion of his 11 to 13 week agency period, the Employer is required to pay the agreed-upon fees for the entire period.[9]

According to Cherry, at the Employer's orientation, the agency-referred individual is told that if he performs satisfactorily during his 11 to 13 week "probationary period" (i.e., the 11 to 13 week period when he is on the agency payroll), there is the "possibility" that he can become a "permanent employee." Cherry testified that "we never guarantee anyone" but the agency-referred individual is told there is the "opportunity," and it is the Employer's "goal" that he become a "permanent employee."[10]

The agency-referred individual is trained on-the-job. If he is to be a loader/unloader, his team trains him; if he is to be a scanner or reach truck driver, he is

[9] Cherry testified that the Employer had hired three or four agency-referred individuals as "permanent employees" before the end of the 11 to 13 week period; however, they were hired as hourly supervisors who are excluded from the bargaining unit.

[10] It should be noted that Cherry's office is in Barbados, and he visits the distribution center about twice a month.

trained one-on-one by another employee in the same job classification. Once he is working, there is no discernible difference between him and the Employer's "permanent employees," that is, he performs the same work as the "permanent employees," is covered by the same employee handbook, and he is assigned work, disciplined and supervised by the Employer.

According to Cherry, after the agency-referred individual has worked for 11 to 13 weeks at the distribution center, the managers decide whether to "keep" him and "make" him a "permanent employee."[11] As noted above, agency-referred individuals earn $6.50 an hour with no other benefits. "Permanent employees" earn $7.50 to $7.75 an hour, with some at $9.50 an hour." "Permanent employees" also have health, dental, vision, and life insurance benefit plans. Cherry testified that if the Employer "hired somebody directly" rather than use an agency-referred individual, the "directly" hired individual would also have a waiting period for benefits.

With respect to the Employer's hire of agency-referred individuals as "permanent employees," Cherry testified that a high attrition rate among agency-referred individuals during the start-up period of the distribution center resulted in a lower percentage of them hired as "permanent employees." Since that time, Cherry estimated that the Employer has hired two-thirds to three-fourths of the agency-referred individuals as "permanent employees."

A random sampling of the Employer's proffered "payroll records" comparing the timesheets for the agency-referred individuals with the payroll records for the Employer's "permanent employees" shows a substantially lower hire rate. For the pay period of February 8 to 14, 1999, 41 On Site and 33 Personally Yours agency-

[11] According to Cherry, the Employer's current "permanent employees" are all former agency-referred individuals. The Employer did not provide a summary of agency referral dates and "permanent" hire dates for the current "permanent employees," and it did not provide the complete timekeeping reports/payroll records in support thereof.

referred individuals appear on the timesheets. These individuals would have begun their 12th week of employment on April 26, 1999, and their 14th week of employment on May 10, 1999. The Employer's payroll summary report for its "permanent" employees as of May 24, 1999, shows that 11 of the 4l On Site agency-referred individuals had become "permanent employees" which represents a hire rate of approximately one-fourth; and nine of the 33 Personally Yours agency-referred individuals had become "permanent employees" which represents a hire rate of approximately one-third. For the pay period of April 19 to April 25, 1999, 63 On Site and 37 Personally Yours agency-referred individuals appear on the timesheets. These individuals would have begun their 12th week of employment on July 5, 1999, and their 14th week of employment on July 19, 1999. The Employer's payroll records for the pay period ending July 3l, 1999, show that 20 of the 63 On Site agency-referred individuals had become "permanent employees" which represents a hire rate of approximately one-third; and 20 of the 37 Personally Yours agency-referred individuals had become "permanent employees" which represents a hire rate of approximately one-half.

The Employer's proffered summary report[12] shows its workforce fluctuated as follows in 1999: January—15 "permanent employees"/88 agency-referred individuals; February—16/73; March—21/92; April—27/98; May—35/90; June—68/65; July—67/73; August—63/54; September—61/47; October—49/38; November—81/2. As noted above, as of December 17, 1999, the Employer employed 70 "permanent employees," with an additional 6 or 7 agency-referred employees. Cherry testified that the Employer terminated about 20 to 25 members of its night shift when it ended in late

[12] The summary report generally appears to reflect the last payroll period in each month. The summary report includes non-bargaining unit employees (approximately 11: six salaried managers, several hourly supervisors, the traffic coordinator, and the accounts payable clerk); however, the record does not show whether these non-bargaining unit employees should be subtracted from the "permanent employee" complement for each month.

September 1999, regardless of their status as an agency-referred individual or a "permanent employee."

The Employer's fiscal year runs from October through September. In fiscal year 1998-1999, the Employer increased its sales by approximately 50 percent. Cherry testified that two-thirds of its sales occur from April through September, with the peak shipping period from May through August. For the fiscal year 1999-2000, Cherry anticipates a sales increase of 30 to 35 percent based on "conversations" with customers and "forecasting" based on customer orders in October and November 1999. In its 1999-2000 budget, the Employer's staffing projection shows 116 non-salaried workers, including 28 on the night shift. Cherry testified that the budget projection represents an average based on its fluctuating workforce. For 1999, the Employer's summary report shows a minimum of 81 for the total workforce; Cherry predicts a minimum of 105 for the total workforce in 2000.

According to Cherry, the Employer begins to increase its workforce in November in anticipation of rising sales. As noted above, the Employer's night shift begins in January or February and ends in late September. Cherry testified that he "projected" that the Employer's workforce ("permanent employees" and agency-referred individuals) would increase by the end of each month as follows: January 2000—112; February 2000—132; March 2000—150. Cherry testified that the workforce "probably" would increase "a little bit" during the "very peak summer"; and the workforce would decrease in the fall proportionately to fall 1999.

As noted above, the Employer's workforce consisted of 61 "permanent employees" and 47 agency-referred individuals in September 1999, and 49 "permanent employees" and 38 agency-referred individuals in October 1999. The decrease is attributed to the end of the busy season and the night shift. In November and December 1999, the workforce was as follows: November—81 "permanent employees" and

December—70 “permanent employees,” there were two agency-referred individuals for each month.

The Employer admits that the agency-referred individuals and “permanent employees” who are terminated at the end of its busy season have no expectancy of future recall.

Based on the foregoing, and the record evidence as a whole, I find that the agency-referred individuals are temporary employees who should not be included in the unit and are ineligible to vote in the election herein. The Employer informs the personnel agency[13] of how many employees it needs for its operations at any given time. The agency recruits, screens, and interviews individuals from its database and sends them to the Employer’s distribution center. If the individual “passes” the Employer’s interview, the individual begins to work at the distribution center. The record shows that the agency requires an “11 week temp to hire placement period.” There is no dispute that the individual remains on the personnel agency’s payroll for an 11 to 13 week period. Thus, the agency-referred individual is initially hired to work for a period of definite duration, the requisite "temp to hire placement period.” During that period of time, he is paid the same wages as all other agency-referred individuals and has no benefits. Thereafter, the Employer is free to hire the agency-referred individual as its “permanent employee” without incurring further liability to the personnel agency for agreed-upon fees. As Cherry testified, it is only at the end of that 11 to 13 week period that decision is made as to whether or not to make an individual a “permanent employee.” Until that point in time, the individual has no status as a permanent employee of the Employer. Thereafter, if the individual becomes a permanent employee, the Employer will pay him higher wages and benefits.

[13] The Employer made no distinction between its relationship with On-Site and Personally Yours.

Although the Employer asserts that it hires two-thirds to three-quarters of the agency-referred individuals as "permanent employees," the random sampling of its proffered records shows a far lower percentage: On-Site--one-fourth and one-third; Personally Yours--one-third and one-half. [14] Moreover, at the Employer's orientation, Cherry admits that the agency-referred individual is "never guaranteed" hire by the Employer as one of its "permanent employees." At the orientation, the Employer uses such terms as "an opportunity" and "a goal" which hardly constitutes a substantial expectancy of future employment with the Employer. In addition, the Employer admits that there is no expectancy of future recall for anyone discharged at the end of its busy season.

The Employer is free to use the services of a personnel agency for any reason, including the Employer's reason of saving the expense of having its own personnel department. However, regardless of the Employer's characterization or categorization of an individual provided by a personnel agency for a definite duration of time for its operations (i.e., "a probationary employee"), the individual's status must be analyzed under well-established Board law regarding the disputed issue of unit placement and eligibility to vote.

Accordingly, as the agency-referred individuals are initally hired only for a definite duration of employment as defined by the personnel agency's requisite "11 week temp to hire placement period," with no guarantee or substantial expectancy of continued employment by the Employer and with no expectation of future recall should they be let go, they are temporary employees during this "probationary period" who should be excluded from the unit and are ineligible to vote in the election herein.[15]

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[14] As previously noted, the Employer did not offer into evidence a complete set of payroll records.

[15] See, e. g., E. F. Drew & Co., Inc., 133 NLRB 155, 156-157 (1961); Sealite, Inc., 125 NLRB 619 (1959). See also Macy's East, 327 NLRB No. 22 (1998).

Based on the foregoing, and the record as a whole, I also find that the election should not be delayed as the evidence fails to establish that the Employer is engaged in a seasonal industry. Rather, the Employer's proffered workforce records show that it is engaged in year-round operations, with an extended busy season from April through September which requires additional workers. The Employer operates a night shift from January or February through September, the end of its busy season. Its records show that at the end of September 1999, the Employer had 61 employees and 47 temporary employees. In October 1999, the Employer had 49 employees and 38 temporary employees; the Employer attributed the decrease to the end of the night shift. In late November and early December 1999, the Employer had 81 and 79 "permanent employees," and two temporary employees, respectively. In November 1999, the Employer began to hire employees in anticipation of rising sales. Despite Cherry's testimony that the Employer's workforce is at its lowest in December, the actual numbers show more "permanent employees" in November and December than any prior month in the year. Thus, the record establishes that the Employer operates its facility on a year-round basis with a substantial complement of employees employed throughout the year and with additional workers needed for its extended busy season.

The Board distinguishes between seasonal industries where an employer operates its facility during certain portions of the year only on a seasonal basis and cyclical industries where an employer operates its facility on a year-round basis with a substantial complement of employees employed throughout the year and with additional workers needed for its busy season or peak periods. In a true seasonal industry, the Board postpones the election until at or near the peak of the season to afford as many voters as possible with the opportunity to cast their ballots. In a cyclical industry, a

postponement of the election would "unduly hamper" year-round employees in the exercise of their Section 7 rights.[16]

Accordingly, in view of the foregoing, and the record as a whole, I find that the following employees of the Employer constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse distribution employees, including carton inspectors, loaders/unloaders, order checkers, order pickers, pallet jack operators, quality control workers, reach truck operators, scanners, system inventory workers, team leaders, yard jockeys, traffic clerks, shipping clerks and inventory clerks employed by the Employer at its Miami, Florida, location, excluding all other employees, temporary employees, traffic coordinators, accounts payable clerks, hourly supervisors, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic

[16] Baugh Chemical Co., 150 NLRB 1034 (1965); Aspen Skiing Corp., 143 NLRB 707, 711 (1963) (an election need not be delayed to the start of the peak season where an employer employs 50 employees in its peak winter skiing season and 14 employees in its summer tourist season).

strike which commenced more that 12 months before the election date and who have been permanently replaced.[17] Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Freight Drivers Warehousemen & Helpers Local 390, International Brotherhood of Teamsters, AFL-CIO.

Dated at Tampa, Florida, this 20th day of January, 2000.[18]

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Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
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[17] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that two (2) copies of the election eligibility list for the unit, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director for Region 12 within 7 days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received by the Regional Office, SouthTrust Plaza, Suite 530, 201 E. Kennedy Boulevard, Tampa, Florida 33602-5824 on or before January 27, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

[18] Under the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by February 3, 2000.